Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1228

KURT SCHMIEDER,

Petitioner,

v.

LOUIS H. HALL, JR., as Executor of the ESTATE OF HELEN B. DWYER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Kurt Schmieder, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered September 20, 1976, affirming the judgment and orders of the United States District Court for the Southern District of New York.

JURISDICTION

The judgment of the court below was entered on September 20, 1976. Timely petition for rehearing and suggestion for rehearing *en banc* was filed, and denied on November 8, 1976. An extension of time to file Petition for Writ of Certiorari to and including March 4, 1977 was granted on January 27, 1977. Jurisdiction to review this judgment is conferred on this Court by Title 28, Section 1254, of the United States Code.

OPINIONS BELOW

The opinion of the court below has not been reported, and is appended as Appendix A. Orders denying rehearing and rehearing *en banc* are appended as *Appendix B* and *Appendix C*. The opinions of the United States District Court for the Southern District of New York are appended as *Appendices D* through *K*. The opinion of the trial court dated September 25, 1975, and its memorandum and order dated March 12, 1976, are reported at 421 F. Supp. 1208 and 421 F. Supp. 1218, respectively.

QUESTIONS PRESENTED

1. Does the Trading with the Enemy Act take away the right of a German national, long after the cessation of hostilities, to bring an *in personam* action not vested as enemy property for fraud, seeking imposition of a constructive trust?

2. Does the return by the United States Government of property seized under the Trading with the Enemy Act to a person who acquired it by reason of fraud and overreaching on the part of an American attorney-at-law wipe out all the defrauded party's rights to sue the person receiving the fruits of the fraudulent behavior?

3. Can the Federal Executive cut off all rights of a former enemy to bring legal action, long after the cessation of hostilities and the operation of the Trading with the Enemy Act, to invoke the power of equity of the federal courts for redress of a wrong *in personam*, rather than the enforcement of a property interest, when the vesting order does not by its language even purport to seize such right?

4. Where a common law gift was not made, but rather an absolute transfer without consideration and without donative intent, to the secretary of the transferor's attorney who professionally advised the transfer and supervised the disposition of the funds, does an equitable duty exist requiring the secretary to repay the amount of unjust enrichment, after the purpose of transfer has been accomplished?

5. Can the Trading with the Enemy Act be used by one receiving property as the result of fraud and overreaching as a means of insulating him from any equitable duty?

6. Can the secretary of an attorney-at-law, who by reason of his fiduciary relationship causes a client to transfer property to her, avoid accountability for the fruits of the poisonous tree?

7. Does the federal common law doctrine against windfall abuse prevent the return of property vested under the Trading with the Enemy Act to persons other than those found entitled thereto by law?
dicially determined?

8. Does the closing of the federal courts to the *in personam* fraud claim of a former enemy national, not seized by the United States Government, against an individual, constitute a violation of the due process clause of the Fifth Amendment to the Constitution of the United States?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Sections 5(b)(1) and 7(c) of the Trading with the Enemy Act (50 U.S.C. Appendix §§ 5(b)(1) and 7(c)), and Article 5 of the Bill of Rights are set forth in *Appendix L.*

STATEMENT OF THE CASE

Petitioner, a German national, inherited property from his family, consisting of business interests in the United States, where petitioner had spent years. He was living in the part of Germany which after World War II became Russian-occupied territory until he succeeded in escaping to West Germany in 1951. Prior to that he was persecuted and imprisoned in East Germany for so-called economic sabotage, and prior to and during World War II was persecuted by the Nazis by reason of his outspoken opposition to the Nazi creed and his membership in an opposition political group.

In the nineteen thirties, in order to avoid the use of his American assets by the Nazis, he concealed his ownership through the use of nominees, at great risk to himself. In 1938, his American attorney, one Louis H. Hall, Sr., recommended to him that he divest himself of all interest in the property, and recommended his secretary, whom petitioner had never met and with whom he had no contact or relationship whatever, as transferee. At

the time, petitioner could have transferred the property to Switzerland and other countries, or even disclosed it to the German authorities without penalty. However, petitioner, without any consideration, transferred all his property in the United States to the secretary, on the oral understanding with Mr. Hall that his rights would be recognized whenever the purpose of the transfer was accomplished. At the end of 1948, the United States Government vested the specific property under the Trading with the Enemy Act, and the secretary filed claim for the return of the property, and a court action in the United States District Court for the District of Columbia for that purpose. She was then represented by Mr. Hall's law firm. She filed a motion for summary judgment, and Judge Alexander Holtzoff wrote an opinion denying the motion, stating that:

"[i]f the case were on trial before me, I should be inclined to hold on the undisputed evidence that the plaintiff has no beneficial title. Here is a stenographer in an office who gets an assignment of property of a client of the office of a value of $200,000. She does not know the original donor. She does not use the property or spend any of it. There is some inference to be drawn that she is only a straw. That is no reflection on her. As a matter of fact, there is nothing reprehensible in being a straw, but there is serious question in my mind whether she has a beneficial interest in that property. . . . The reason or motive is not important. What is important is whether there was an intention to vest a beneficial interest in the plaintiff without any understanding whatsoever of the principals that she was to hold it for the benefit of the prior

owner [Kurt Schmieder], or that she was to return it to the prior owner. That is the question. . . . I think there is a material issue of fact as to whether the plaintiff is the beneficial owner of this property and that cannot be determined as a question of law."

That opinion was issued in the face of a statement Mr. Hall had sent to East Germany in June 1948 for petitioner to sign, indicating an absence of any claim on his part in regard to the property. Petitioner, in reliance on Mr. Hall's advices, had no hesitancy in signing this, and could in any event make no inquiries from East Germany, which also had stringent laws prohibiting the ownership of foreign assets.

Subsequently, on the eve of trial, the action was dismissed, and outside the court record the parties entered into an extra-judicial settlement under which the secretary received fifty-five percent of the property vested.

Following the petitioner's release from prison and escape from East Germany, he made inquiry with the son of Mr. Hall, who had died in 1949, as to the status of the property and the whereabouts of the secretary, but received no information. The son was a member of the same law firm as his father, and the secretary continued to serve as his personal law secretary until 1953, when she retired.

In 1967, petitioner discovered the whereabouts of the secretary through his own efforts, and asked her for an accounting. This was rejected in her behalf by a former partner of the law firm.

Respondent, with his sisters, is a principal beneficiary of the secretary's property under a will and trust, and is the executor of her will. He was substituted for her as defendant following her decease in May 1970. He filed

a number of motions for dismissal and summary judgment, all of which were denied, as per opinions appended as *Appendices D* through *F*. At trial, the court found in favor of respondent, and on appeal the judgment was affirmed. Post-trial motions by petitioner were denied, and a second action was dismissed on grounds of *res judicata*, all of which dispositions were also affirmed on appeal.

REASONS FOR GRANTING THE WRIT

This Court has held that under the federal common law, the Trading with the Enemy Act cannot be used as a means of permitting a windfall to a person who is not entitled equitably to it, simply because the Act barred an action by the technical enemy. *Ex Parte Kawato*, 317 U.S. 69.

What the court below has done is allow the heirs of an American attorney, who advised a German national that rather than use other means available to protect his American interests he should transfer them to his secretary, to benefit by the attorney's violation of his fiduciary duty. The dismissal of petitioner's action was based on the Trading with the Enemy Act, which the trial court held to have deprived petitioner of standing to bring the action. Although there have been holdings that where property is vested under the Act, and thereafter sold to third parties, no right of action exists against the purchaser, there is no case where this doctrine has been invoked in an *in personam* action against the person in whose possession the property was vested, who could in no sense be considered a *bona fide* purchaser, and was not the recipient of a common law gift, there being no donative intent.

After having dismissed the action on the ground of standing, the trial court proceeded to pass on the merits, holding that petitioner had not satisfied his burden of proof that the secretary was a party to a 1938 conspiracy to defraud petitioner, and without this, the action must fail. According to this, by placing the property in the hands of his secretary rather than himself, the attorney has apparently succeeded in insulating it from any attempt on the part of petitioner to reclaim his property, even though the ultimate beneficiaries of the property are the children of the attorney, rather than the members of the secretary's family.

What this holding does is to grant a license to attorneys to steal clients' property, provided they find a straw party as to whom it is not possible for the client to show direct involvement in the planning of the wrongdoing. This Court has been zealous in upholding a high standard of fiduciary responsibility on the part of attorneys in their dealings with clients, so as to avoid even the appearance of conflict of interest. The holding of the court below, particularly in the face of the opinions of Judge Holtzoff of the United States District Court for the District of Columbia, and three judges of the United States District Court for the Southern District of New York indicating that the admitted absence of any consideration or donative intent created a strong presumption of wrongdoing, runs counter to the clear position of the Court.

Further, the position of the Court in reducing federal technical defenses on the ground of standing, except where expressly stated by Congress, runs counter to the holding of the court below. Nothing in the Trading with the Enemy Act requiring a denial of standing was pointed out by the court below, and none exists, especially as to private actions not involving the Federal Government.

The position of the United States, in expressing what it considers the interest of the Federal Government, is quite unusual. Rather than supporting an effort to uncover and provide relief for what is obviously an overreaching on the part of a member of the bar, it suggests that ratification of its settlement with the respondent is in the public interest.

The holding of the court below runs counter to the position of the United States Court of Claims in *Gmo. Niehaus & Co. v. United States,* 153 F. Supp. 428, holding, under the authority of the decisions of this Court in *Miller v. United States,* 11 Wall. 268 and *Silesian-American Corporation v. Clark,* 332 U.S. 469:

> "The doctrine of these cases is that an enemy does not lose his substantive rights in property, merely because of the existence of war, or as a result of a physical act of seizure by persons purporting to act for the Government, unless there is an applicable statute declaring automatic forfeiture or authorizing seizure."

While general vesting authority existed in the present case, there was no statutory authority for the forfeiture of rights of petitioner. The Federal Government, having full knowledge prior to the issuance of the vesting order of the same facts later before Judge Holtzoff when he found the inference flowing from them, including the 1948 statement of petitioner, determined to issue a vesting order finding the property to be that of petitioner, and then after vesting, the opinion of Judge Holtzoff, and dismissal of respondent's suit, proceeded to return to respondent by an extra-judicial settlement the majority of the property subject to the vesting order. Petitioner learned only fortuitously of the partial return of the property.

Under the *Kawato* doctrine, a limitation attaches to the authority of the United States Government when it vests property, that it shall either be retained by the Government, or returned to the person who is entitled to receive it. Thus, instead of suggesting that it is in the interest of the United States that the settlement with respondent be upheld, as the Federal Government has done here, it is submitted that it should have suggested that the interest of the Government was that a windfall be avoided, and that the court determine either that the property should go to petitioner or be retained by the Government as enemy property.

While perhaps the Justice Department has an interest in defending a settlement which it made in the face and disregard of the strong position as expressed by Judge Holtzoff, based on facts substantially identical with those adduced at trial, including petitioner's 1948 statement, it is submitted that it should feel a stronger responsibility to protect both the public interest and that of the bar in preserving its integrity.

CONCLUSION

For the above reasons, it is suggested that this case is one calling for the exercise of the authority of the Court in maintaining the standards of behavior of the bar, as well as supervising the basic responsibilities of the lower federal courts, in accordance with the position taken by the Court in the maintenance of those standards and responsibilities. Further, the question of the treatment of foreign nationals friendly to this country in the federal courts is one of importance, which should call for review.

Petitioner would point out that a companion action has been pending in the United States District Court for the District of Massachusetts since 1971, at which time petitioner learned through the probate proceedings involving the secretary's will of the existence of an *inter vivos* trust established by the secreta · after the petitioner had traced her whereabouts, comprised of five-sixths of her property, in which the children of Mr. Hall were exclusive beneficiaries. This discovery was subsequent to the filing of the present action in 1969. The Massachusetts action aims at the impression of a constructive trust on the trust property, and is directed against Hall, Jr., individually, and as executor of the secretary's estate, and against his two sisters and the trustees. Multi-district litigation rules were not applicable, and petitioner applied to have the New York litigation kept dormant until the Massachusetts case, where all parties and issues were before the court, was decided. Respondent opposed, and the application was denied. A motion by respondent and his two sisters for summary judgment has been filed in Massachusetts.

In the Massachusetts court, the action is based on the obligation of Hall, Jr., as an attorney, so that the defense on the basis of which the New York courts found against

petitioner on the merits, the failure to satisfy the burden of proof that the secretary was a party to a conspiracy, does not apply, since as to lawyers the burden is reversed.

In the interest of procedural economy, it is suggested that the present petition be held in abeyance until the determination of the Massachusetts action, since only then can the total impact of this case on the public interest be fully appreciated.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 85, 86, 87—September Term, 1976.

(Argued September 1, 1976 Decided September 20, 1976.)

Docket Nos. 75-7696, 76-7038, 76-7264

KURT SCHMIEDER,
Plaintiff-Appellant,

v.

LOUIS H. HALL, as Executor of the Estate of Helen B. Dwyer,
Defendant-Appellee.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from orders entered in the United States District Court for the Southern District of New York, by Whitman Knapp, *Judge,* dismissing complaint seeking to impose a constructive trust on property on grounds of fraud, denying relief from judgment, and dismissing on summary judgment, pursuant to Fed. R. Civ. P. 56, a second complaint seeking the same remedy on grounds of "windfall abuse" and general equitable principles.

Affirmed.

JAMES P. DUFFY, III, New York, New York, (Werner Galleski, Thomas A. Illmensee,

Robert H. Reiter, Richard L. Medverd, of counsel) *for Plaintiff-Appellant.*

JOHN S. MARTIN, JR., New York, New York, (Morton Turchin, of counsel) *for Defendant-Appellee.*

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York (Frederick P. Schaffer, Assistant United States Attorney, of counsel) *filed a suggestion of interest for the United States Government urging affirmance.*

KAUFMAN, *Chief Judge:*

"As a litigant," said Learned Hand, "I should dread a lawsuit beyond anything else short of sickness and death."[1] This thought must have often recurred to these parties, who have been locked in combat since 1969, seeking to resolve a controversy whose roots extend over 40 years into the past. Because we agree with Judge Knapp's able opinion disposing of Herr Schmieder's attempt to impose a constructive trust on certain assets given by him to Mrs. Helen Dwyer in 1938, our primary duty is to determine whether this judgment precludes an action grounded in the very same transaction but invoking an entirely novel legal theory. Since we believe the initial judgment bars any later action based on the same set of events, we are pleased, hopefully, to free these parties from the toils of litigation and grant repose.

I.

The facts are fully set forth in Judge Knapp's opinion

1 L. Hand, Deficiencies of Trials to Reach the Heart of the Matter, 3 Lectures on Legal Topics, Assn. Bar City of N.Y. 89, 105.

and need but brief summary here. In 1928, Schmieder, a German national, received about $250,000 in settlement of his father's World War I claims against the American government, arising out of the seizure of a New Jersey textile factory owned by Schmieder's family. This sum was deposited in the New York Trust Co., and, although subject to German property taxes, was not reported at this time to the Weimar Republic. In 1932, however, on the eve of the Nazi takeover, Schmieder divided his American assets into two parts. The smaller, about one-third of the total, he reported to the German authorities, while the larger portion continued to be held clandestinely in the United States.

The Third Reich enacted increasingly harsh penalties for those who hid property abroad, and Schmieder was forced to take ever more stringent precautions against detection of his American holdings. Accordingly, in 1934 he transferred legal title to his sister-in-law, Jenny Bochmann, who was a Swiss citizen. And two years later he directed his American lawyer, Louis Hall, Sr., to set up Stoneleigh Corp. to hold Mrs. Bochmann's assets. By 1937, however, the risk of holding unreported assets was such that Mrs. Bochmann, who had family in Germany, desired to sever completely her connection with Schmieder's scheme.

Hall advised Schmieder that his property could not be held in the United States with the identity of the true owner concealed. Since the assets could not be taken to Germany, the only remaining course, Hall stated, was to give them away. Schmieder was understandably reluctant to take this step, but his hesitation disappeared when the Nazi authorities called him in for questioning about his foreign holdings.

Not long after, and most likely because the penalty for

concealing property held abroad included death. Schmieder delegated Hall and William Graupner, a friend who had been acting as an intermediary between Schmieder and his American lawyer, to select a donee. The two men chose Helen Dwyer, Hall's personal secretary. Mrs. Dwyer was an orphan whose husband had become mentally deranged and who was herself in poor health. Hall and Graupner felt that her misfortunes made her a deserving recipient of Schmieder's largesse. Hall drew the appropriate papers, and Schmieder, having been expressly informed by Graupner that the gift must be absolute, "with no strings attached," wrote on a slip of paper: "I am in agreement with the arrangement which we have discussed for my sister-in-law." Mrs. Bochmann formally made the gift in 1938. The value of the property was then $120,000.

A cloud again passed over these ill-starred assets in October, 1941, when the United States, looking forward to the possibility of war, required registration of property held by American citizens on behalf of foreign nationals. On the advice of George Z. Medalie, a prominent attorney, Mrs. Dwyer reported the facts surrounding the gift. Twenty months later, on June 30, 1943, the United States Government blocked the accounts containing the gift property. During the succeeding five years Mrs. Dwyer repeatedly applied for licenses to use some of the funds and for unblocking. Moreover, she consistently maintained the gift was genuine and irrevocable and that she was not holding the property on anyone else's behalf. These pleas fell on deaf ears, however, and in December, 1948, the Alien Property Custodian issued an order vesting all the property Mrs. Dwyer had received from Jenny Bochmann in the United States.[2]

2 The order was issued under the Trading with the Enemy Act, 50 U.S.C. App. §§1 et seq.

Mrs. Dwyer promptly commenced an action seeking return of the property. In this connection, on June 1, 1948, Schmieder signed a statement declaring:

> The undersigned confirms herewith that it is understood by him that the gift of Mrs. Bochmann's bank balance with the New York Trust Company and of securities deposited there to Mrs. Dwyer is a voluntary, absolute and irrevocable gift, without any obligation of Mrs. Dwyer.

Two years later, in 1951, the United States, in settlement of the suit, returned 55% of the seized assets. And so the matter stood until 1969, when Schmieder began the first of the two lawsuits involved in this appeal.[3]

The essence of Schmieder's claim in both lawsuits is that Mrs. Dwyer, or her legatee, should not be permitted to avail herself of his distress in 1938 to keep the fortune he then gave her to avoid the threat of execution by the Nazis. In the 1969 action Schmieder clothed this underlying idea in the language of fraud. He asserted that he made the gift as a result of a gentlemen's agreement between himself and Hall, Sr. that the property would be returned to him when the "emergency" passed. In reliance on this misrepresentation, he asserts, he gave his American assets to Mrs. Dwyer, who shortly thereafter

3 Mrs. Dwyer died the day the complaint was served, and two years later, on August 24, 1971, her executor and principle legatee, Louis Hall, Jr., was substituted as defendant.

Schmieder also appeals the denial of his motion under Fed. R. Civ. P. 60(b) for relief from judgment, and, in addition, moves to vacate Judge Knapp's judgment in the 1969 suit and his orders of December 11 and 22, denying relief from judgment and rehearing. The gist of his argument, both on the appeal and with respect to the motion to vacate, is that Judge Knapp's opinion leaves the scope of the judgment uncertain. Schmieder concedes that our decision on the res judicata effect of the 1969 suit governs his appeal of the denial of relief from judgment. Appellant's brief at 42. The motion to vacate is *in pari materia* with this appeal, and, in view of our disposition of this case, must be denied.

willed the fortune to members of Hall's family. The effect of this, Schmieder insists, is that Hall prevailed upon his client to give the property to himself.

Judge Knapp rejected this argument on two grounds. Since any claim Schmieder might assert must have arisen out of events that occurred in 1938, Judge Knapp decided that any interest Schmieder might have had in the gift assets was vested in the United States by the 1948 order. Accordingly, the Judge said, the appellant lacked standing to subject Mrs. Dwyer's property to any claims whatever. In any event, Judge Knapp decided, Schmieder gave his American fortune away to guarantee his own safety, and the gift was "without obligation" to Mrs. Dwyer and made without any misrepresentation to Schmieder. The Judge also found that Hall and Mrs. Dwyer had not conspired to bring the Schmieder fortune into Hall's family. Based on these findings, Judge Knapp concluded that Schmieder was not induced to give the fund to Mrs. Dwyer by fraud.

Undaunted by this decision, Schmieder on January 30, 1976, commenced a new action, inspired by the same intuition of unfairness, but asserting an obligation under federal common law[4] and general equitable principles requiring Mrs. Dwyer's executor to restore the gift to him. Judge Knapp dismissed the new complaint as *res*

4 Schmieder asserted the novel theory of "windfall abuse," the core of which is the federal policy forbidding private litigants from standing in the place of the government in asking that the rights of enemy aliens be abrogated. *See* Ex parte Kumezo Kawato, 317 U.S. 69, 75 (1942) (Japanese seaman may sue in admiralty to recover unpaid wages.) It is hard to understand what benefit Schmieder hopes to derive from this theory, since Judge Knapp has already determined that Mrs. Dwyer's property was received from Schmieder as an absolute gift and that, subsequently, the Government seized every interest Schmieder might have had in the subject assets. Of course, we do not have occasion to rule on this issue. But we should observe how thoroughly the factual questions involved in proving "windfall abuse" are intertwined with those resolved against Schmieder in the 1969 action.

judicata. Noting that his previous opinion had held "plaintiff had no standing in law or equity or otherwise to challenge defendant's possession of the property received as a result of the settlement of her suit against the government" and "assuming such standing, plaintiff had not established entitlement to the monies in question on the ground of fraud (equitable or other), unjust enrichment or otherwise," Judge Knapp concluded that, if either of these grounds were affirmed on appeal, Schmieder would be forever foreclosed. Because we agree with Judge Knapp's conclusion and reasoning, we shall add only a few brief comments.

II.

"Res judicata is a principle of peace." *Opelousas-St. Landry Securities Co. v. United States*, 66 F.2d 41, 44 (5th Cir. 1953). We cannot underestimate the importance of repose to parties, like those before us, who have been locked in combat for more than seven long years in a dispute whose seed was planted about 40 years ago. But we must also attach fundamental significance to the interest of society and the courts in the final resolution of disputes. The explosion of federal dockets in recent years is so notorious as to require no comment. Judicial resources today are an increasingly scarce commodity, and it is of the utmost importance that litigants use them wisely.

Judicial economy ordinarily demands that the whole controversy between the parties should be brought before the same court in the same action, particularly where the acts complained of and the recovery are the same. *See Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 470 (3d Cir. 1950). We should emphasize, therefore, that Schmieder's claim of unjust enrichment, whether

grounded in state or federal law, is nothing more than a new legal formulation of the very dispute resolved by Judge Knapp's original decision. The events constituting Schmieder's asserted injury are substantially the same in the two cases. All the facts necessary to support Schmieder's claim in the second action were alleged or could have been alleged in the first. Schmieder merely wishes the opportunity toadvance reasons for recovery not presented to or, in Schmieder's view, not adequately considered by Judge Knapp in his initial opinion. To indulge this lavish desire would be an acquiescence in the abuse of the judicial process. *See Williamson* v. *Columbia Gas & Elec. Corp.*, *supra*; *Miller* v. *National City Bank of N. Y.*, 166 F.2d 723, 727 (2d Cir. 1948); *Moreno* v. *Marbil Productions, Inc.*, 296 F.2d 543 (2d Cir. 1961); Restatement (Second) of Judgments, (T.D. No. 1, March 28, 1973) §61 comment c at 82-83; 1B J. Moore, Federal Practice, ¶0.410[1] at 1160. This we refuse to do, and accordingly, we affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, held at the United States Court House, in the City of New York, on the eighth day of November, one thousand nine hundred and seventy-six.

Present:

Hon. Irving R. Kaufman,
Hon. Wilfred Feinberg,
Hon. Ellsworth Vangraafeiland, [Filed Nov. 8, 1976]
Circuit Judges.

KURT SCHMIEDER, Plaintiff-Appellant v. LOUIS H. HALL, JR., as Executor of the Estate of Helen B. Dwyer, Defendant-Appellee	:	75-7696

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant Kurt Schmieder.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of November, one thousand nine hundred and seventy-six.

KURT SCHMIEDER,
Plaintiff-Appellant

v.

LOUIS H. HALL, JR., as Executor of the Estate of Helen B. Dwyer,
Defendant-Appellee

[Filed Nov. 8, 1976]

Docket No. 75-7696

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the plaintiff-appellant, Kurt Schmieder, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufmann

IRVING R. KAUFMANN,
Chief Judge

APPENDIX D

ENDORSED ORDER OF FRANKEL, D. J. ON SEPTEMBER 26, 1969 DENYING MOTION

Re: Schmieder v. Dwyer – 69 Civ 1939 639a

Endorsement

Defendant's motion assumes the large burden of demonstrating "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The burden is not sustained. Plaintiff's appeal to the "conscience of equity," *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (1919), invokes principles that are intrinsically open-ended and adaptable to the infinite varieties of conceivably "fiduciary" relationships. See, e.g., Restatement of Restitution §§160, 166 (1937); Bogert, *Trusts & Trustees* §§481-82 (2d ed. 1960); *Sinclair v. Purdy*, 235 N.Y. 245, 252-54 (1923). It is not possible to say that the broad allegations of the complaint afford no room for the proof of facts to which such principles might apply. Evidently sensing the possibility that a court might so hold, counsel for defendant undertook upon argument of the motion to forecast evidentiary matters inconsistent with some of the complaint's assertions. But there is no occasion, of course, upon this Rule 12 motion without affidavits, to treat with such speculations.

The motion is denied. So ordered.

Dated: New York, New York
September 26, 1969

/s/ Maurice E. Frankel
U.S.D.J.

APPENDIX E

OPINION OF MOTLEY, D. J. ENTERED AUGUST 24, 1971 GRANTING SUBSTITUTION AND DENYING SUMMARY JUDGMENT 693a

This is an action by Kurt Schmieder, a citizen of the Federal Republic of Germany, against Helen B. Dwyer, a former New York resident, now deceased, to recover certain properties transferred to her in 1938 pursuant to an alleged "irrevocable and unconditional" gift which plaintiff now seeks to have the court look behind. The essence of plaintiff's claim is that the gift was made to prevent the Nazi regime in Germany, which was in power at the time of the transfer, from using the transferred assets for their own aims. Plaintiff asserts that it was understood among the parties effectuating the transfer, to wit, himself and two United States counsel, William Graupner and Louis Hall, Sr., that such was the purpose of the gift. He claims there was a "gentlemen's agreement" between them to return the property to him at the conclusion of the war. Mrs. Dwyer, an asserted "straw" in the agreement and the person to whom the property was transferred, never had any contact with plaintiff, and was at the time of transfer a secretary in the employ of Mr. Hall, Sr.

The following background facts will be helpful to an understanding of the case:

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Plaintiff was living in Germany in 1934. He had certain stocks which were being held in trust for him by the New York Trust Company in the United States. At that time, in an effort to protect himself and his assets (having an aggregate value of $200,000), he transferred their ownership to his sister-in-law, a Swiss national. In or about 1935, plaintiff, feeling that his assets *in nomine* Jenny Bochmann were no longer safe from discovery by the Nazis, sought the counsel of his friend, William Graupner, a United States citizen, as to what he might do. Graupner, in turn, solicited the legal advice of Louis Hall, Sr., also of the United States (Hall, Sr., and Graupner are now both deceased). Louis Hall, Sr. and Graupner advised plaintiff that he should create a corporation to manage the securities. Plaintiff agreed and on or about January 1, 1936, the Stoneleigh Corporation was set up. All 500 shared of the corporation were issued to Mrs. Bochman in her name. Plaintiff, however, still was fearful that the securities might be traced to him. His fear was well founded in view of the "Act Concerning Economic Sabotage" which had become German law on December 1, 1936. That Act provided for death and confiscation of property of German citizens who concealed property in foreign

[695a]

lands. Mrs. Bochmann was also concerned that her nominal ownership might cause trouble with Swiss authorities. There was also the fear that Switzerland might be overrun by the Nazis as well. Plaintiff finally decided to eliminate all risk by completely divesting himself of all ownership. After discussions with Graupner, plaintiff met with Louis Hall, Sr. in Leipzig, Germany. Mr. Hall, Sr. told plaintiff that Mrs. Dwyer, Hall Sr.'s secretary, would accept the gift of the property. In March, 1938, all the shares of Stoneleigh Corp. were transferred by Mrs. Bochmann to Mrs. Dwyer by means of three letters—one from Bochmann to Dwyer; one to Hall, Sr.'s firm, setting forth

her desire that an unconditional gift be made; one to Stoneleigh Corporation authorizing the transfer. Plaintiff never met with Mrs. Dwyer, but he knew of the transfer arrangements. It is alleged that Louis Hall, Jr., movant here, prepared the documents for the transfer of 1938.

In 1948, the United States, pursuant to the Alien Property Act, seized the securities held by Mrs. Dwyer. She commenced an action against the Alien Property Office in 1949 in the United States District Court for the District of Columbia. At that time plaintiff signed a statement under oath in Germany stating that the gift to Mrs. Dwyer was "voluntary, absolute, and irrevocable . . . without any obligation of Mrs. Dwyer." In 1951, Mrs. Dwyer entered into a stipulation settling the pendent claim, and she received 55% of the value of the property.

During World War II plaintiff had no communication with anyone in the United States. In 1945, at the war's end, he was sentenced to prison by the Soviet Military and Occupation authorities for anti-Communist activities. Following his release plaintiff had conversations with an intermediary sent by Mr. Hall, Sr. and Graupner, and following those discussion the 1948 document referred to above was signed. Shortly after executing the document, plaintiff was reincarcerated by the East German Communist Regime for crimes against the State.

Plaintiff asserts that in 1951 when he finally was released by the East Germans he was advised by a letter from Graupner not to take any action to assert his claim in the action then before the United States District Court (the *Dwyer* suit). He states that he was reassured that his interests were being protected by Graupner and Messrs. Hall, Jr. and Sr.

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Following Graupner's death in 1954, plaintiff states he was unable to find Mrs. Dwyer until 1969. In 1969, the instant action to impress a constructive trust upon the subject property and for other relief was filed.

Mrs. Dwyer died on May 16, 1969. Plaintiff further alleges that in 1968, Hall, Jr. purporting to act on Dwyer's behalf moved $60,000 (5/6'ths) of the subject property from New York to Massachusetts. There a trust fund with Dwyer as life beneficiary was set up. Said trust provided that upon Dwyer's death the remainder of the property would be distributed in equal shares to Hall, Jr., and his two sisters, Adelaide McIntosh and Virginia Webb. Hall, Jr. was named executor in Dwyer's will of September 6, 1966.

On August 6, 1970 the Surrogate's Court of New York County appointed Hall, Jr., executor (preliminary) of Dwyer's will. Since then charges have been made by distributees of Dwyer that Hall, Jr. unduly influenced Dwyer (his secretary after his father's death) to make her will of 1966 out to him and his two sisters as residuary legatees.

The matter is now before this court on a motion by Louis Hall, Jr., son of the senior Mr. Hall, now deceased, for an order 1) pursuant to Fed R. Civ. P. 25(a), substituting Louis Hall, Jr., as preliminary executor of the estate

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of Helen Dwyer, for Helen Dwyer, individually, named defendant in the action, and 2) pursuant to Fed. R. Civ. P. 56, dismissing the complaint on the ground that there are no disputed issues of fact and defendant's estate is entitled to judgment as a matter of law.

Plaintiff's opposition to the motion consists essentially of the following: 1) the relationship of Louis Hall, Jr., to the estate is tenuous since there are presently "meritorious" actions outstanding in opposition to his appointment as preliminary executor of Mrs. Dwyer's estate and, therefore, he should not be substituted as defendant until those actions to have him removed are determined; 2) since movant is a non-party to the suit whose application to be substituted as executor should be denied, he cannot now move for summary judgment; and 3) the motion for summary judgment should be denied in any event because movant has failed to dispel the inference of undue influence arising from the facts and, thus, may not be entitled to a judgment as a matter of law.

The motion to substitute Louis Hall, Jr. is granted for the reasons set forth below:

The motion for summary judgment is denied on the ground that there are many disputed issues of fact, including

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the central issue of whether the gift to Mrs. Dwyer was unconditional or subject to an alleged gentlemen's agreement between plaintiff and the lawyers.

The heart of plaintiff's claim in opposition to the substitution of Louis Hall, Jr., is that Louis Hall Jr.'s position as preliminary executor is tenuous in view of motions brought by plaintiff and Mrs. Dwyer's statutory distributees for revocation of the preliminary letters in the New York Surrogate Court. Movant has pointed out, however, that plaintiff moved for revocation of the preliminary letters as early as December, 1970, and said motion was denied on December 17, 1971. The instant motion was filed April 5, 1971. The papers seeking revocation of the

preliminary appointment attached to the moving papers by plaintiff included only memoranda in connection with the motion for revocation. During the pendency of the instant motion, that motion, for reargument too, has been denied. (Estate of Helen B. Dwyer, N.Y.L.J. at 18, June 18, 1971). Thus, there is no reason for this court to conclude that Louis Hall, Jr.'s removal as preliminary executor is imminent.

Plaintiff next argues that this court should refuse the substitution for the present as a "tactical matter." In particular, plaintiff points out that since the filing of

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this suit on May 6, 1969, plaintiff has commenced a second action in the United States District Court for the District of Massachusetts on April 15, 1971. Mrs. Dwyer died shortly after commencement of the instant suit on May 16, 1969. The second action is brought against Louis Hall, Jr., the trustee of an inter vivos Massachusetts trust which purportedly consists of 5/6's of the property plaintiff claims is his, and two sisters of Louis Hall, Jr., named remaindermen under the trust. According to plaintiff, this court should stay its hand, since he will be pursuing the Massachusetts claim more actively, the risk of a distribution being imminent under that trust.

This court is unwilling to use Rule 25(a), a rule which has as its end the expedition of litigation, to accomplish a contrary end, i.e., the slowing down of litigation. There is no reason to afford the Massachusetts action priority over the instant one. (See *National Equipment Rental, Ltd. v. Fowler,* 287 F.2d 43 (2d Cir. 1961); *Bulldog Elec. Prods. Co. v. Cole Elec. Prods. Co.,* 57 F.Supp. 336 (E.D.N.Y. 1944), in which the court's articulate the rule

that the first court to obtain jurisdiction over parties and issues should usually have

[701a]

priority over the second court).

The motion pursuant to Fed. R. Civ. P. 25(a) is granted.

Dated: New York, New York
August 19, 1971

CONSTANCE BAKER MOTLEY
U. S. D. J.

APPENDIX F

[763a]

ENDORSED ORDER OF BONSAL, D.J. DATED DECEMBER 29, 1971 DENYING DEFENDANT'S MOTION

Endorsement

KURT SCHMIEDER v. LOUIS H. HALL, Jr. as Preliminary Executor of the Estate of HELEN B. DWYER
69 Civ. 1939

Motion No. 65 on 11/23/71

Defendant moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing the complaint.

By decision filed August 24, 1971, Judge Motley denied a prior motion by defendant for summary judgment "on the ground that there are many disputed issues of fact, including the central issue of whether the gift to Mrs. Dwyer was unconditional or subject to an alleged gentlemen's agreement between plaintiff and the lawyers." Earlier, Judge Frankel reached the same conclusion in denying defendant's motion to dismiss the complaint, pointing out that "Defendant's motion assumes the large burden of demonstrating 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The burden is not sustained."

Defendant now contends that the vesting of the property under the Trading with the Enemy Act cut off any interest of plaintiff, particularly when coupled with the plaintiff s statement made under oath at that time. It is

true that a purchaser for value from the Alien Property Custodian would be protected from any claims by the enemy national. Here, however, Mrs. Dwyer was at all times a donee and not a purchaser, and plaintiff may be able to establish that he was still under restraint of the Communist authorities when he made his statement. On all the facts, plaintiff should be afforded an opportunity to prove an equitable interest in the property at trial.

Accordingly, defendant's motion for summary judgment is denied.

It is so ordered.

Dated: New York, N. Y. Dudley B.
December 29, 1971.

APPENDIX G

[876a]

OPINION OF KNAPP, D. J. DATED SEPTEMBER 25, 1975

KNAPP, D.J.

This six year old diversity action was tried without a jury on June 30 and July 1 of this year. Plaintiff Kurt Schmieder, a citizen of the Federal Republic of Germany, seeks to impress a constructive trust upon certain property of the estate of the late Helen B. Dwyer. The defendant Louis Hall, Jr., an attorney, is the executor and a principal beneficiary of the Dwyer estate.

In essence, the plaintiff claims that there was a gentlemen's agreement to return to him at some future time certain property which was transferred unconditionally and absolutely to Mrs. Dwyer in 1938. Plaintiff alleges that he was defrauded by Mrs. Dwyer who, he maintains, was acting on behalf of Louis Hall, Sr., the father of the present defendant, and the attorney who drafted all of the relevant documents relating to the transfer of the property.

The defendant, who is being sued in his capacity as executor of the Dwyer estate, vigorously denies the plaintiff's allegations. He contends that there were no such gentlemen's agreement, and that the gift to Mrs. Dwyer was, in fact, unconditional and absolute. Furthermore, the defendant claims that any interest that plaintiff may have had in the property was cut off in 1948 when his property was vested by the Alien Property Custodian pursuant to the Trading with the Enemy Act, 50 U.S.C. App. §1 *et seq.*

[877a]

After carefully considering all the testimony, depositions and documents submitted in this case, we find for the defendant on both the above grounds, and, accordingly, dismiss the plaintiff's complaint.

I. Background

The crucial events in this rather unique litigation occurred almost forty years ago, in 1938, when Helen Dwyer became the recipient of an "irrevocable and unconditional" gift of property, the beneficial owner of which had been plaintiff Kurt Schmieder. Moreover, in order to fully understand these events it is necessary to discuss occurrences which date back as far as World War I. Not surprisingly, with the exception of Schmieder, the principal protagonists in this dispute – Louis Hall, Sr., William Graupner, and Helen Dwyer – are all deceased.[1]

During World War I, property owned by Schmieder's father was seized by the United States Government pursuant to the Trading with the Enemy Act. 50 U.S.C. App. §1 *et seq.* In 1928, as his father's sole heir, Schmieder received the return of an amount equal to eighty percent of the value of the property seized. Shortly thereafter, Schmieder devised a scheme to evade legitimate German property taxes on the money thus returned to him.[2] The evidence indicates that he divided the returned property into two funds. The larger fund was no reported to the German taxing authorities, while the smaller fund was.

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In the early 1930s, this unreported account was transferred into the name of Schmieder's sister-in-law, Jenny Bochmann,[4] a resident of Switzerland.

Thus, the situation stood in 1934 when the Nazis came into power. The relevance to this lawsui of that historical event is that the Nazi regime enacted increasingly severe penalties – culminating in the possible sentence of death – for those who concealed property abroad.[5] This factor led Mrs. Bochmann (who had a son living in Germany) and Schmieder to take a series of steps in order to disassociate themselves from the unreported funds. In 1935, Schmieder met Louis Hall, Sr., who was then vacationing in Germany. The meeting took place at the house of a mutual acquaintance, William Graupner. There, Schmieder asked Hall certain general questions concerning the formation of a corporation to hold securities in the United States, and the tax consequences of establishing such a corporation.[6] Hall, Sr. was a senior partner in the New York law firm of Putney, Twombly & Hall, the firm that had previously represented the corporation owned by plaintiff's father which had been the original source of plaintiff's American wealth.

In the fall of 1936, Graupner returned to the United States and told Hall, Sr. that his law firm should draw up the necessary paper to establish a personal holding corporation for a woman named Jenny

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Bochmann. Acting pursuant to these directions, Hall Sr. supervised the formation of Stoneleigh Corporation. All the shares of Stoneleigh were issued to Mrs. Bochmann in consideration for the transfer to the corporation of the assets in Mrs. Bochmann's name which had been in an account at the New York Trust Company. Herman Graupner, William Graupner's son, was named president of Stoneleigh. Louis Hall, Jr., then an associate in his father's firm, helped draft the papers creating Stoneleigh.

In April, 1937 William Graupner received a letter from Jenny Bochmann stating that she no longer wanted her name used for Stoneleigh and that she wanted to sever all connections with the corporation.[7] Graupner discussed the matter with Hall, Sr., who indicated that there was no way the property could be held in the United States with the names of the true owners concealed. Hall advised that since Mrs. Bochmann wished to divest herself of all interest in the property, and since Schmieder himself could not take the property back to Germany,[8] the only solution would be to give the assets of Stoneleigh away.[9]

William Graupner returned to Germany in the summer of 1937 and told Schmieder what Hall had said. Schmieder was hesitant at first, but by the fall of 1937, he decided to take Hall's advice. He notified Graupner of his decision, explaining that since they had last spoken he been called in by the German authorities to make

[880a]

a report concerning his foreign holdings.[10] According to Graupner, it was expressly stated to Schmieder that the gift must be absolute, with "no strings attached."[11] Schmieder supposedly agreed, and told Graupner that he and Hall should take care of all the necessary arrangements, including the choice of a donee. At the time of this discussion, Schmieder gave Graupner a slip of paper upon which he wrote in German: "I am in agreement with the arrangement which we have discussed for my sister-in-law."[12]

Upon Graupner's return from Europe, he and Hall began to take the necessary steps to dispose of the Stoneleigh Corporation assets. After discussing the possibility

of making either of their respective sons the recipient of the gift, they decided that the property should be given to Helen Dwyer, then Hall Sr.'s personal secretary. The necessary papers were drafted by the elder Hall, forwarded to Switzerland, and finally signed and returned by Mrs. Bochmann. Among the papers pursuant to which the gift was made was a letter dated March 15, 1938, from Mrs. Bochmann to Mrs. Dwyer which stated:

> "I am the owner of the outstanding stock of Stoneleigh Corporation . . . . I wish to make an absolute gift to you of both my stock in the said corporation and of my claims for advances against it . . . ."[13]

The value of the Stoneleigh stock at the time was approximately $120,000.

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Helen Dwyer had been the elder Hall's secretary since 1929. Born in 1895, she was orphaned at the age of three and from 1898 to 1914 lived with her aunt and uncle. During the First World War, she married a man who was in the Navy. Tragically, however, early in the 1920s her husband was committed to a mental institution, run by the Veterans Administration, where he remained until his death. Hall, Sr. maintained that it was Mrs. Dwyer's unfortunate past that had prompted the decision to make her the beneficiary of the Stoneleigh assets.[14]

Despite her new wealth, Mrs. Dwyer's lifestyle did not undergo any radical shift. Although she moved from Brooklyn to a larger more expensive apartment on Central Park South in Manhattan, she continued to work as Hall, Sr.'s personal secretary. She expended from the assets of

the property approximately $2,000 per year for personal expenses.[15] Shortly after the gift, she had the first of a long series of wills drafted which left the bulk of her estate to various members of Hall, Sr.'s family.

In October, 1941, with war between the United States and Germany imminent, the United States Treasury issued regulations requiring the registration of all property held by United States citizens for or on behalf of foreign nationals. After discussing the matter with Hall, Sr., Mrs. Dwyer contacted a lawyer, not involved with the

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Stoneleigh transaction, in order to obtain his opinion as to what action she should take. The attorney, George Z. Medalie, Esq., advised her that it would be best to report to the government the facts surrounding the gift.[16]

On October 31, 1941, Mrs. Dwyer reported the unconditional gift on Treasury Form TFR-300. Thereafter, on June 30, 1943, her accounts containing the property she received from Stoneleigh were blocked by the government. From August 1, 1943 to October 15, 1948 Mrs. Dwyer filed nineteen applications for licenses to use some of the funds or for unblocking. She consistently maintained during this period that the gift from Bochmann was genuine and irrevocable, and that she was not holding the property on behalf of any person other than herself.[17]

In December, 1948, the Alien Property Custodian issued Vesting Order No. 12528, whereby he seized all of the property which Mrs. Dwyer had received from Stoneleigh on the ground that it was the property of Kurt Schmieder.[18] Mrs. Dwyer, in turn, commenced an action seeking the return of the property, claiming that it had been received by her as an absolute and unconditional gift. In 1951, a

settlement was reached in the suit pursuant to which 55 percent of the seized property was returned to Mrs. Dwyer. A crucial piece of evidence which led to the settlement was a signed statement by Schmieder, obtained on June 1, 1945, which read:

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> "The undersigned confirms herewith that it is understood by him that the gift of Mrs. Bochmann's bank balance with the New York Trust Company and of securities deposited there to Mrs. Dwyer is a voluntary, absolute and irrevocable gift, without any obligation of Mrs. Dwyer.

The statement was witnessed by a Dr. Alfred Lindner, who was apparently a mutual friend of Schmieder and William Graupner.[19]

The plaintiff now contends that this absolute gift was subject to a gentlemen's agreement, whereby it was intended that the money transferred to Mrs. Dwyer would sometime in the future be returned to him. He claims that the perpetrator of the fraud against him was Louis Hall, Sr., who acted as his attorney in the transaction, and whose family will now end up with the bulk of the Stoneleigh assets since Hall's children are the principal beneficiaries of the Dwyer estate. Schmieder charges that Mrs. Dwyer knew of this gentlemen's agreement, and acted as the agent for Hall, Sr., in the perpetration of the fraud.

I. Plaintiff's Standing to Sue

Before turning to the merits of the factual dispute, it is first necessary to determine whether, in light of the government's vesting order of 1948, plaintiff Schmieder

still has any interest in the subject property. The defendant contends that the vesting order terminated every interest of plaintiff – legal or equitable, vested contingent – in the property transferred to Dwyer. We agree.[20]

[884a]

On December 15, 1948 the Office of Alien Property issued Vesting Order 12528 entitled "Stock Owned by and Debts Owing to Kurt Schmieder."[21] The order began by stating that Schmieder was a resident of Germany and thus a national of a designated enemy country. The order went on to list various securities in Mrs. Dwyer's name which were traceable to the gift from Mrs. Bochmann and stated that such property was

> "property within the United States owned or controlled by, payable or deliverable to, *held on behalf of or on account of*, or owing to, or which is evidence of ownership or control by, Kurt Schmieder the aforesaid national of a designated enemy country (Germany);" (emphasis added)

The order concluded:

> "THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."[22]

Subsequent to the vesting of this property, Mrs. Dwyer brought suit for the return of the property to her on the ground that Schmieder did not have any interest in the property. As noted above, the lawsuit was settled pursu-

ant to a stipulation which provided that Mrs. Dwyer would be given securities having a value of 55 percent of the total amount seized.[23]

The statute, pursuant to which Schmieder's interest in the property held by Mrs. Dwyer was vested, provides that with respect

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to any seized property, the Alien Property Custodian

> "shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof."

50 U.S.C. App. §12. The Supreme Court has held that under the Trading with the Enemy Act alien enemy owners are divested of every right – beneficial as well as legal – in respect of money and property seized. *Cummings v. Deutsche Bank* (1936) 300 U.S. 115, 120; *Woodson v. Deutsche, etc., Vormals* (1934) 292 U.S. 449, 454. See, also, *Balkan Nat. Ins. Co. v. C.I.R.* (2d Cir. 1939) 101 F.2d 75, 77; *United States v. Borax Consol.* (N.D. Cal. 1945) 62 F.Supp. 220, 223.

It thus seems clear that if Schmieder had any interest in the property conveyed to Mrs. Dwyer, that interest was totally extinguished when the vesting order was issued. At that moment, the Alien Property Custodian had full and complete title to the property, and had the authority to deal with that property in any manner appropriate to

the interests of the United States, including the settlement of a claim with a third party. Indeed, since the claim that the government settled when it reconveyed certain property back to Mrs. Dwyer was a claim that Schmieder retained some beneficial interest in the property, it seems apparent that the very interest Schmieder asserts

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in this action is the one which was subject to the vesting order and ultimately disposed of in its settlement with Mrs. Dwyer.

Furthermore, the cases interpreting the Trading with the Enemy Act have uniformly held that a divested alien has no right to pursue an action against a subsequent transferee from the United States for the return of vested property. In *Mutzenbecher v. Ballard* (S.D.N.Y. 1925) 16 F.2d 173, *aff'd* (2d Cir.) 16 F.2d 174, *cert. denied* 273 U.S. 766, plaintiff, a German co-partnership, sought to collect certain commissions earned by the defendant in the United States to which the plaintiff was in part entitled. Plaintiff's interest, however, had been seized by the Alien Property Custodian. The court held that upon seizure only the Alien Property Custodian could institute suit against the defendant for the commissions. It went on to state (16 F.2d at 17)

> "Where the Alien Property Custodian has made a disposition of seized property of an enemy alien, including the adjustment of an alleged claim, such settlement cannot be attacked by the enemy alien, nor has the enemy alien any standing in a suit brought against the one with whom the Alien Property Custodian has settled."

Similarly, in *Munich v. First Reinsurance Co.* (2d Cir. 1925) 6 F.2d 7 *appeal dismissed* 273 U.S. 666, the Alien Property Custodian had seized stock in the defendant corporation which was owned by the plaintiff, a German corporation. Thereafter, the Custodian sold the property, and out of those proceeds, paid the defendant, who had asserted a claim against the plaintiff, a sum of about $50,000. In affirming the

[887a]

dismissal of plaintiff's complaint against the defendant for a return of that money, the Court of Appeals explained (6 F.2d at 747):

> "The complainant, at the time the Custodian seized and sold its shares of stock in the defendant company, was, in our opinion, divested of all right, title, or interest in the property, and in the proceeds realized by the subsequent sale fo the property. It could not thereafter reclaim the property from the person to whom it was sold. It had no right to or interest in the proceeds of the sale, and no right to reclaim any portion thereof which the Custodian paid over to a third person in settlement of a claim which such person had against the enemy."

In the face of such established legal precedent, the plaintiff sets forth three arguments in support of his position that he has standing to bring this action.

First, Schmieder argues that the vesting order related solely to specific items of property and was carefully

drafted so as not to deprive him of any equitable claims against Mrs. Dwyer. Plaintiff, however, has suggested no motive as to why the Alien Property Custodian would wish to attach an alien enemy's legal interest in specified property and not his equitable interests as well. Such a disposition would clearly contravene the purposes of the Trading with the Enemy Act,[24] and we are convinced that in this case such a result was clearly not intended.

[888a]

Secondly, plaintiff claims that even if he had a beneficial interest in the property at the time of the vesting, this interest was regained when the government reconveyed certain of the properties back to Mrs. Dwyer. This argument, too, must be rejected. As noted above, once vesting occurs, the Alien Property Custodian becomes the actual owner of the seized property. He has the right to sell the property, or to settle claims involving the property. When these events occur, however, the divested owner cannot regain any previously lost rights in the property. The whole scheme of the Act militates against such a result. 50 U.S.C. App. §7(e) provides that those who deliver money or property to the government pursuant to a vesting order are fully discharged of their obligations with respect to that property "for all purposes." Such transferors may not be held liable in any court for their compliance with a vesting order. Furthermore, as indicated above, subsequent transferees from the government cannot be sued by one whose property has been vested. Indeed, the Act explicitly states that the sole remedy available to an enemy alien is an action against the government on the ground that the vesting order was improper. See, 50 U.S.C. App §7(c) and §9.[25]

Finally, the plaintiff argues that his claim for fraud did not arise until long after the vesting order was issued and the property returned to Mrs. Dwyer. He maintains that "the equitable duty to make restitution to Schmieder did not arise until the late 1960s when Schmieder

[889a]

learned for the first time that Dwyer, the Halls, and the Graupners had 'conspired' and acted to keep the property."[26] This argument, however, ignores the fact that whatever equitable interests Schmieder had in the property arose on the very day in 1938 when it was transferred to Mrs. Dwyer. While his failure to discover the fraud until the 1960s would affect the running of the statute of limitations, it could in no way alter the fact that his interest on the property pre-dated the vesting order. And, as noted above, whatever that interest was, it was totally extinguished by the seizure of the property by the Alien Property Custodian.

II. Merits

Although we have found that the plaintiff does not have standing to pursue this action, we deem it appropriate, in the event that ruling should be overturned, to proceed to a decision on the merits.

As we have seen, the basic factual issues in this dispute concern the arrangements made when the Stoneleigh Corporation assets were given to Mrs. Dwyer. Schmieder claims that Hall, Sr. and Graupner had agreed that the property would be returned to him at some future time. He claims that Mrs. Dwyer knew of this gentlemen's agreement when she took the property, and that acting in concert with Hall, Sr. reneged on the promise.

[890a]

At first blush, there appears to be substance to the plaintiff's charges.[27] Mrs. Dwyer never – to the day of her death – met Schmieder or Mrs. Bochmann. She was chosen as the donee by her employer, Louis Hall, Sr., who, at the time, was acting as Schmieder's attorney in the disposal of the funds. Mrs. Dwyer had a personal and trusting relationship with Hall, and probably would have accepted the gift of property conditionally had Hall requested her to do so. Shortly after receiving the gift, she executed the first of a series of testamentary instruments all of which were drafted by or at the direction of Louis Hall, Sr., or Louis Hall, Jr., and all of which named members of the Hall family as primary beneficiaries. When, after the war, Schmieder tried to get in contact with Mrs. Dwyer, she acted in a singularly ungracious fashion, considering that Schmieder had been the ultimate source of her wealth and, whatever his motives, had rendered significant assistance in her efforts to get the property back from the government. Finally, no reasonable explanation for her conduct in this regard was even proffered.

However, having considered all these and other facts and circumstances, we conclude that singly or in combination they do not establish that in 1938 Mrs. Dwyer and Louis Hall, Sr. embarked upon and consummated a conspiracy to defraud Schmieder. In this connection we observe that while generally either a constructive trust[28] or fraud[29] must be proved by clear and convincing evidence, we do not feel that plaintiff would have established his case even if normal civil standards of proof were to prevail.[30]

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case even if normal civil standards of proof were to prevail.[30]

Analyzing the evidence we start out with a realization that plaintiff Schmieder is a highly unsatisfactory witness. He knowingly and wilfully perpetrated a scheme in the early 1930s to evade legitimate property taxes imposed by the German government in the days of the Weimar Republic, a circumstance that can hardly be explained – as his attorneys attempt to – as hostility to the Nazis. Secondly, his present position in this lawsuit is directly antithetical to his sworn statement in 1948 that the gift to Mrs. Dwyer had been irrevocable and unconditional. This statement was a critical motivating factor in the government's decision to settle the Dwyer lawsuit, and we reject plaintiff's claim that he had no idea of the statement's purpose at the time it was made.

In addition to the unsatisfactory nature of Schmieder's testimony, we must also observe that every other participant in the transaction at issue – Mrs. Dwyer, Hall, Sr., and William Graupner – has specifically repudiated and contradicted Schmieder's testimony. Moreover, although Mrs. Dwyer and Hall, Sr. might be assumed to have had selfish motives that might have prompted false testimony,[31] no one has suggested a reason why William Graupner would also commit perjury. All that is known about him is that he was a friend of both Schmieder and Hall, and that neither he nor his son either had or hoped for any

[892a]

interest in the property given to Mrs. Dwyer.

Setting to one side considerations of veracity, and turning to the probabilities of the situation, they lean more in defendant's direction than in plaintiff's. Looking at the matter from Schmieder's point of view, it must be remembered that in 1938 when the gift was made the Nazi

regime was at its height and no one – least of all a resident of Germany – would have been likely to anticipate that the regime would be lying in ruins in seven short years. Moreover, what Schmieder was seeking to avoid was the risk of being put to death upon discovery that he had been hiding foreign assets. In these circumstances, it seems more probable that he would have wished to get rid of all traces of ownership by an absolute gift rather than enter into some "gentlemen's agrement" which might conceivably have come to the attention of the Nazi authorities. Of course, many years later – with Nazi power only an unpleasantly remembered nightmare – Schmieder's recollections of his 1938 sentiments might have undergone a drastic change.

From Hall, Sr.'s and Mrs. Dwyer's point of view, it seems improbable that they would have undertaken the risks of playing fast and loose with their own government just to enable Schmieder (practically a stranger to Hall and a total stranger to Mrs. Dwyer) to outwit his.

[893a]

With respect to Mrs. Dwyer's ultimate use of the money for the benefit of the Hall family, while it might generate suspicion, it cannot serve as a basis for a finding of fraud. It is clear that Mrs. Dwyer had a high regard for her employer and his family. There is no showing in the record that she had any close relationships with any members of her own family. She was aware of the fact that it was Mr. Hall who designated her as the recipient of the gift. It cannot therefore be thought unnatural that she should have decided to make the Hall family the recipient of her bounty upon her decease.[3]

This leaves only what we have described as Mrs. Dwyer's ungracious conduct at the time Schmieder tried to make contact with her and the defendant's total failure to offer any rational explanation for such conduct. This troubled the court during the trial, and still does. While it would be easy to postulate an explanation for the conduct it is difficult to imagine why none was offered. As to a possible explanation, Mrs. Dwyer had after all taken an oath in a federal court that there were no strings attached to the property in her hands and that she owed Schmieder absolutely no duty to account for the same. She might very well have feared that any conduct on her part inconsistent with such a position – such as even a meeting or a discussion with Schmieder – could have caused the government to reopen its case or might even have landed her in jail for perjury. But if such – or anything like it – were the cause of Mrs. Dwyer's conduct, Hall, Jr., who was advising her in the matter, must have been aware of these considerations and could easily

[894a]

who was advising her in the matter, must have been aware of these considerations and could easily have testified concerning these motivations. Nevertheless, neither ungracious conduct on Mrs. Dwyer's part in 1967, nor lack of candor on Hall, Jr.'s part – if such there was – in 1975, are sufficient (separately or taken together) to support a finding that Mrs. Dwyer and Hall, Sr. had in 1938 embarked upon and consummated a conspiracy to defraud.

CONCLUSIONS

In summary, we find that plaintiff has no standing to pursue this action, and, in the alternative, that plaintiff

has failed to satisfy his burden of proof. Accordingly, the complaint must be dismissed.

The foregoing shall constitute the court's findings of fact and conclusions of law pursuant to Rule 52(a) of the the Federal Rules of Civil Procedure.

SO ORDERED.

Dated: New York, New York
September 25, 1975.

/s/ Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

[895a]

FOOTNOTES

1/ Defendant has urged that plaintiff is precluded from testifying about conversations with Louis Hall, Sr. and William Graupner by virtue of New York State's Dead Man's Statute, Section 4519, Civil Practice Law and Rules, McKinneys Consol. Laws of N.Y. c. 7B. We find that provision inapplicable, and accordingly, we have considered all relevant testimony submitted at trial in reaching our conclusions.

2/ See Defendant's Exhibit 4. From 1925-1931, Germany had a property tax, and a resident of Germany was required to include property located outside Germany in his property tax return. Failure to disclose such property was a criminal offense. In 1931, the maximum sentence for this offense was increased from two years to ten years imprisonment. In addition,

beginning in 1931, Germany enacted foreign exchange controls which required citizens to report their foreign holdings. By 1932, the maximum penalty for failure to report was also ten years imprisonment.

3/ Plaintiff's Exhibit 26A, p. 41; Exhibit 27A, pp. 144-148.

4/ Plaintiff's Exhibit 27A, pp. 12-16.

5/ Defendant's Exhibit H.

6/ Plaintiff's Exhibit 2A, p. 5.

7/ Plaintiff's Exhibit 4C, pp. 15-19.

8/ To the extent such a finding is at all relevant, we find that Hall, Sr. knew by this time that Schmieder was the beneficial or real owner of the assets of Stoneleigh Corporation.

9/ Plaintiff's Exhibit 4C, pp. 19-24; 2a, pp. 7-8. We are, of course, not concerned in this litigation with whether the legal advice rendered by Hall, Sr. was correct or not. It should be noted, however, that plaintiff has not suggested any alternative course that could have been legally followed.

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10/ Plaintiff's Exhibit 4C, p. 26.

11/ Plaintiff's Exhibit 4C, p. 27.

12/ Plaintiff's Exhibit 4C, p. 39.

As is obvious, this statement is highly ambiguous and sheds no light whatsoever on the discussions between Graupner and Schmieder.

13/ Defendant's Exhibit E.

14/ Plaintiff's Exhibit 2B, p. 3.

15/ Plaintiff's Exhibit 9A, p. 5.

16/ Plaintiff's Exhibit 9A, pp. 5-6.

17/ Plaintiff's Exhibit 9A, p. 7.

18/ Plaintiff's Exhibits 12A, 12B.

19/ Defendant's Exhibit K-2.

20/ Although this specific issue may have been decided in plaintiff's favor either directly or indirectly by other district judges to whom this case may have been previously assigned, we cannot now avoid the responsibility of considering the question *de novo*. *Dictograph Products Company v. Sonotone Corporation* (2d Cir. 195) 230 F.2d 131, 134-6, *cert. dism.* 352 U.S. 833 (Judge Learned Hand). See, also, *Rodriguez v. Olaf Pedersen's Rederi A/S* (E.D.N.Y. 197) 387 F. Supp. 754.

21/ Plaintiff's Exhibit 12-A.

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22/ The original Vesting Order, Exhibit 12-A, was subsequently amended, but only to the extent of changing

the description of the securities vested. See Plaintiff's Exhibit 12-B.

23/ Plaintiff's Exhibit 13.

24/ In *United States v. Chemical Foundation* (1926) 272 U.S. 1, 9-10, the Supreme Court stated:

> "The purpose of the Trading with the Enemy Act was not only to weaken enemy countries by depriving their supporters of their property, . . . but also to promote production in the United States of things useful for the effective prosecution of the war." (cite omitted)

The Court indicated that the Act should be "liberally construed to give effect to the purposes it was enacted to subserve." See, also, *Clark v. Finanz-Korp.* (1947), 332 U.S. 480.

25/ Plaintiff relies heavily on *Craig v. Bohack* (2d Dept. 1963) 19 A.D.2d 891, 244 N.Y.S.2d 737. To the extent this case supports plaintiff's position, we feel it should be disregarded as an incorrect statement of federal law.

26/ Plaintiff's Post-Trial Brief at 27.

27/ The government, when it vested the Dwyer properties in 1948, obviously thought that some agreement to return the property to Schmieder existed. Judge Holtzoff, who presided over the suit filed by Mrs. Dwyer to reclaim the vested property, in fact indicated during that proceeding that he felt Mrs. Dwyer had no title in the property, and was simply a "straw".

(Plaintiff's Trial and Evidence Memorandum at 10). Obviously, since the action in that case was settled by stipulation, and never formally tried by Judge Holtzoff, his remarks are not binding.

28/ See, *Lundy v. Murtagh* (Sup. Ct. 1955) 141 N.Y.S.2d 247, appeal dismissed 143 N.Y.S.2d 820, and cases cited therein.

29/ *McDonnell v. American Leduc Petroleums* (2d Cir. 1972) 456 F.2d 1170; *Fein v. Starrett Television Corp.* (1st Dept. 1952) 280 App. Div. 670, 116 N.Y.S.2d 571, *aff'd* 305 N.Y. 856.

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30/ If Hall, Sr. had himself accepted the gift from his client Schmieder, the burden would have been upon him to establish the propriety of his conduct. See, *In re Bartel's Will* (4th Dept. 1970) 33 A.D.2d 987, 307 N.Y.S.2d 260; *Howland v. Smith* (3rd Dept. 1959) 9 A.D.2d 197, 193 N.Y.S.2d 140. However, that doctrine cannot be here invoked in the absence of proof that he was in a conspiracy with Mrs. Dwyer.

31/ Even so, it must be born in mind that Hall, Sr., a respected member of the New York Bar and a name partner in a leading law firm, cannot lightly be thought to have assumed the risks of committing perjury before a federal court in an action against the United States government. In this connection, we note that over plaintiff's strenuous objection we allowed two witnesses to give character testimony on behalf of Hall, Sr. This may well have been technical error.

The testimony was allowed at a time when we felt we would probably find for plaintiff and were anxious to let the defendant build up the best record possible for purposes of appeal. However, if error it was, we can certify it was harmless beyond a reasonable doubt. We were well aware of the reputation of Hall, Sr. and his firm, and all the testimony accomplished was to confirm our then suspicion that Hall, Jr., was not being candid about his awareness of the events of 1938. That suspicion has since subsided in light of Schmieder's acute need for secrecy. At that time, Hall, Sr. may well have been proceeding on a "need to know" basis in marking disclosures to his son.

32/ Mrs. Dwyer also loaned money to Hall, Jr. during her lifetime, but the same considerations would seem to apply to that transaction.

APPENDIX H

MEMORANDUM DECISION AND ORDER OF KNAPP, D.J. ON DECEMBER 9, 1975 DENYING MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

-against- : 69 Civ. 1939

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,

Defendant.

MEMORANDUM AND ORDER

KNAPP, D.J.

It seems to me that the original Opinion answers the questions presented by the second motion for relief from judgment, and that any attempt to clarify would be futile. However, I shall state that it is my belief that *res adjudicata* would bar the new action which – as I gather – plaintiff proposes to commence. The original holding was to the effect that the vesting order had cut off all rights of every description which plaintiff had or could claim in the fund. Thereafter, since plaintiff had no claims of any kind against the fund, there was nothing of which any fraud by defendant could have deprived him.

The second motion for a new trial is accordingly denied.

SO ORDERED.

Dated: New York, New York
December 9, 1975

WHITMAN KNAPP, U.S.D.J.

[1016a]

APPENDIX I

[Filed December 22, 1975]

MEMORANDUM DECISION AND ORDER OF KNAPP, D.J. ON DECEMBER 18, 1975 DENYING MOTIONS FOR WANT OF JURISDICTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER, Plaintiff,	:	
-against-	:	69 Civ. 1939
LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER, Defendant.	:	

MEMORANDUM AND ORDER

Plaintiff having filed his appeal to the Court of Appeals, I am without jurisdiction to entertain his current (third) motion to reargue. Moreover, it is my view that no purpose would be served by an application for remand, in that my previous opinions already make clear that plaintiff's proposed new complaint would be barred by the doctrine of *res judicata.* This is true for two reasons: (a) the first part of my opinion was that plaintiff had no standing in law or equity or otherwise to challenge defendant's possession of the property received by Mrs. Dwyer as a result of the settlement of her suit against the government; and (b) the second part held that, assuming such standing, plaintiff had not established entitlement to the monies in question on the ground of

fraud (equitable or other), unjust enrichment or otherwise. If the Court

[1017a]

of Appeals upholds either such holding, the Plaintiff is, in my view, forever foreclosed.

If plaintiff is in doubt as to this, I suggest that he file his proposed new complaint and ask that it be referred to me as a related case. I shall then enter an order dismissing it, on grounds of *res judicata,* and plaintiff can immediately appeal from that order and request the Court of Appeals to consolidate both appeals.

The motion for reargument is denied because this court is without jurisdiction. Accordingly, the companion motion for extension of time to transmit the record on appeal is also denied.

SO ORDERED.

Dated: New York, New York
December 18, 1975.

/s/ Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

[1078a]

[Filed March 12, 1976]

APPENDIX J

MEMORANDUM DECISION AND ORDER OF KNAPP, D.J. ON MARCH 12, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER, Plaintiff,	:	
-against-	:	76 Civ. 499
LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER, Defendant.	:	

MEMORANDUM AND ORDER

KNAPP, D.J.

Defendant moves to dismiss the complaint on grounds of *res judicata,* claiming that all issues tendered by the instant complaint have been decided adversely to plaintiff in a previous action between the same parties having the same caption and bearing Index No. 69 Civ. 1939.

The complaint in the 1969 action was dismissed after a bench trial. After plaintiff had appealed to the Court of Appeals, he made a motion for reargument before me. In denying that motion, I observed:

"Plaintiff having filed his appeal to the Court of

Appeals, I am without jurisdiction to entertain his

[1079a]

current (third) motion to reargue. Moreover, it is my view that no purpose would be served by an application for remand, in that my previous opinions already make clear that plaintiff's proposed new complaint would be barred by the doctrine of *res judicata.* This is true for two reasons: (a) the first part of my opinion was that plaintiff had no standing in law or equity or otherwise to challenge defendant's possession of the property received by Mrs. Dwyer as a result of the settlement of her suit against the government; and (b) the second part held that, assuming such standing, plaintiff had not established entitlement to the monies in question on the ground of fraud (equitable or other), unjust enrichment or otherwise. If the Court of Appeals upholds either such holding the plaintiff is, in my view, forever foreclosed.

If plaintiff is in doubt as to this, I suggest that he file his proposed new complaint and ask that it be referred to me as a related case. I shall then enter an order dismissing it, on grounds of *res judicata,* and plaintiff can immediately appeal from that order and request the Court of Appeals to consolidate both appeals."

[1080a]

The suggestions contained in the above question were

followed by all concerned. Plaintiff filed his new complaint, the Clerk of the Court referred it to me as related to the previous action, and defendant moved to dismiss on grounds of *res judicata.* I follow my predicted course of action, and grant defendant's motion.

Plaintiff cites several authorities which, he claims, should deter me from this course: *Ex Parte Kawato* (1942) 317 U.S. 69; *McNellis v. First Federal Sav. & & Ass'n of Rochester, N.Y.* (2d Cir. 1966) 365 F.2d 251; *Stoehr v. Miller* (2d Cir. 1923) 296 F. 414; *Gardner v. Ogden* (1860) 22 N.Y. 827; *Re Herter's Estate* (Sur. N.Y. Co., 1948) 193 Misc. 602, 83 N.Y.S.2d 36, *aff'd* 274 App. Div. 979, 84 N.Y.S.2d 913; *Scott on Trusts* (Third Ed. 1967) § 462.4; *Bogert, Trusts & Trustees* (2d Ed. 1940) §472. None of them give any support to his position.

Ex parte Kawato holds that – at least on April 15, 1941 – the Trading with the Enemy Act did not apply to resident enemy aliens. No resident enemy alien is here involved.[1]

In *McNellis* the Second Circuit held that a state court adjudication that a certain person had not been insolvent in April and June of 1962 did not foreclose – on grounds of *res judicata* – a finding of insolvency in August and September of that year.

Stoeher established that the alien property custodian acquired no title to an alien's alleged interest in a trust said to

[1081a]

have been declared by an American citizen where, as the

Court found, the declaration of trust had never become effective.

Gardner has no discrenible bearing on this litigation.

In *Herter,* the Surrogate held that – as a matter of New York law – the alien property custodian could not exercise a widow's right of election against her husband's will, especially where such exercise would take property from legatees who were American citizens.

Scott's treatise – to the extent that it is relevant – supports my original view that whatever rights plaintiff may have had arose the moment Mrs. Dwyer received the property from him, and that such rights had duly vested in the alien property custodian.[2] *Bogert* is to the same effect.

Plaintiff having failed to persuade me that my original views were erroneous, I grant defendant's motion to dismiss the complaint on grounds of *res judicata.*

SO ORDERED.

Dated: New York, New York
March 12, 1976.

/s/ Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

[1082a]

FOOTNOTES

1/ Plaintiff's actual reference is to the brief of the United States *amicus curiae* in *Kawato*. However, plaintiff does not indicate how that brief could be here relevant.

2/ Insofar as it is arguable that the prior litigation did not encompass plaintiff's novel theory that – at some time after the vesting order – a new duty arose in Mrs. Dwyer which was totally unrelated to her receipt of assets from plaintiff, I dismiss that claim as frivolous.

APPENDIX K

ENDORSED ORDER OF KNAPP, D.J., ON MAY 3, 1976 THROUGH WYATT, D.J.

Motion denied as to prayer for relief demanded in paragraphs (a), (b) and (d); granted as to relief demanded in paragraph (c). The clerk is directed to enter judgment dismissing the complaint in this case in accordance with the memorandum and order dated March 12, 1976.

SO ORDERED

Inger P. Wyatt
USDJ 5/3/76

(Signed as the Part I Judge in the absence of Judge Knapp who is ill)

MICROFILM

APPENDIX L

Title 50, Appendix, United States Code:

* * * * *

Section 5. * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise –

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or carmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has any interest,

by any person, or with respect to any property subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold,

or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Section 7. * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is

owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1 to 6, 7 to 39 and 41 to 44 of this Appendix].

Any requirement made pursuant to this Act [said sections], or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest tp cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been re-

quired to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [said sections], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

Amendment V, Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

Supreme Court, U. S.
FILED
MAR 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1228

KURT SCHMIEDER,

Petitioner,

against

LOUIS H. HALL, JR., As Executor of the ESTATE OF HELEN B. DWYER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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KURT SCHMIEDER,

Petitioner,

against

LOUIS H. HALL, JR., As Executor of the ESTATE OF HELEN B. DWYER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Questions Presented

1. Whether the finding of a district court that a plaintiff has failed to meet his burden of proof merits review by this court?

2. Whether the district court was correct in its alternative holding that the vesting of an enemy alien's property by the Alien Property Custodian deprives the alien of all legal and equitable interest in that property?

Statement of the Case

On May 16, 1969, plaintiff Kurt Schmieder, a citizen of the Federal Republic of West Germany, commenced this action against the late Mrs. Dwyer claiming she had a "moral obligation" to give to plaintiff certain cash and securities which he claimed he gave to her as a gift, "impregnable at law", when he was a citizen and resident of Nazi Germany in 1938 and she was a citizen and resident of the United States.

Following a non-jury trial held on June 30 and July 1, 1975, the Honorable Whitman Knapp filed an opinion and order dismissing plaintiff's complaint on the ground that plaintiff had failed to sustain his burden of proof and, alternatively, that plaintiff lacked standing to sue because any interest plaintiff had in the subject property was cut off in 1948 when all of his property was vested by the Alien Property Custodian pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 1, et seq.

Judge Knapp, in a detailed opinion, set forth the reasons why he rejected plaintiff's claim that in 1938 he reached a gentlemen's agreement with Mrs. Dwyer's employer Louis Hall, Sr. that the gift property would be returned to him at some future time and that a fraud had been perpetrated on him by Mr. Hall and Mrs. Dwyer. First, Judge Knapp rejected plaintiff's own testimony, which provided the sole factual basis for his claim, noting that, by his own admission, plaintiff had knowingly and willfully evaded legitimate taxes imposed by the Weimar Republic in the early 1930s, and that plaintiff's present contention was directly contrary to a sworn statement he signed in 1948. In addition, the Court carefully analyzed all of the facts and concluded "that singly or in combination they do not establish that in 1938 Mrs. Dwyer and Louis Hall, Sr. embarked upon and consummated a conspiracy to defraud Schmieder."

The Court of Appeals affirmed, in an opinion which expressed agreement with "Judge Knapp's able opinion disposing of Herr Schmieder's attempt to impose a constructive trust on certain assets given by him to Mrs. Helen Dwyer in 1938". The Court of Appeals wrote only to emphasize that principles of *res judicata* barred Schmieder's attempt to institute a new action after his original complaint was dismissed by Judge Knapp.

The underlying facts are fully stated in Judge Knapp's detailed opinion and are fairly summarized in the opinion of the Court of Appeals. Both of those opinions are contained in the Appendix to the Petition for a Writ of Certiorari and nothing would be gained by restating the facts here.

Argument

Although the petition lists eight questions which allegedly merit review by this Court, petitioner's discussion of the reasons for granting the writ deals only with Judge Knapp's alternative holding that the petitioner lost any equitable interest he might have had in the subject property when that property was vested by the Alien Property Custodian in 1948.

At the outset it should be noted that petitioner's factual assertions are based on his own testimony concerning the events at issue which was rejected by both courts below. Thus the district court specifically held that petitioner failed to meet his burden to prove that there ever was a gentlemen's agreement that the gift property would be returned to him.

At all events, the district court correctly held that, in view of the vesting of the subject property by the Alien Property Custodian in 1948, petitioner lacked standing to bring an action for the return of that property.

On December 15, 1948, the Office of Alien Property filed vesting order 12528 entitled "Stock Owned by and Debts

Owing to Kurt Schmieder". That order listed various securities traceable to the gift to Mrs. Dwyer and stated the described property

> "is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by Kurt Schmieder, the aforesaid national of a designated enemy country (Germany);"

The order concluded:

> "THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."

Subsequent to the vesting of this property by the Attorney General, Mrs. Dwyer brought suit for the return of the property to her on the ground that Schmieder did not have any interest in the property. The lawsuit was settled pursuant to a stipulation which provided that 55% of the total value of all securities seized would be returned to Mrs. Dwyer and that "the Attorney General will deliver to plaintiff in proper form for transfer of record to plaintiff" specific securities listed therein.

The statute pursuant to which the Attorney General vested Schmieder's entire interest in the property held by Mrs. Dwyer provides that in regard to seized property, the Alien Property Custodian may "exercise any rights or power which may be or become appurtenant thereto or to the ownership thereof in like manner *as though he were the absolute* owner thereof" (Emphasis added). (Trading with the Enemy Act, 50 U.S.C. App. § 12). This Court has held that under the clear language of this statute "alien enemy owners were divested of every right in respect of the money and property seized and held by the Custodian . . ." *Cummings* v. *Deutsche Bank,* 300 U.S. 115, 120 (1937), and cases cited therein. See also, *Balkan Nat'l Insurance Co.* v. *Commissioner,* 101 F.2d 75, 77 (2d Cir. 1939); *Societe Suisse* v. *Cummings,* 99 F.2d 387, 395 (D.C. Cir. 1938), *cert. denied sub nom. Societe Suisse* v. *Murphy,* 306 U.S. 631 (1939); *United States* v. *Silliman,* 65 F.Supp. 665, 673 (D.N.J.), reversed on other grounds, 167 F.2d 607 (3rd Cir.), *cert. denied,* 335 U.S. 825 (1948); *United States* v. *Borax Control,* 62 F.Supp. 220, 222-223 (N.D. Cal. 1945).

Even if plaintiff Schmieder retained a beneficial interest in the property when it was conveyed to Mrs. Dwyer in 1938, that interest was totally extinguished when the property vested in the Attorney General. The Court expressed the point succinctly in *United States* v. *Borax Control, supra* at 223:

> "The Alien Property Custodian, therefore, may now be said to hold full and complete title to enemy property in behalf of the United States, *without any beneficial interest remaining in the former owner.* He may deal with such property, including the selling of it, in any manner appropriate to the interests of the United States." (Emphasis added).

Thus, the United States Government had the unfettered right to dispose of any interest Schmieder had in the property. Since the claim that the Government was finally settling when it reconveyed the property to Mrs. Dwyer was a claim that Schmieder retained some beneficial interest in that property, it is clear that the very interest which Schmieder here asserts is the one which the Alien Property Custodian seized by the vesting order and finally disposed of in the settlement with Mrs. Dwyer.

Thus the court below correctly concluded that plaintiff lacked standing to maintain a cause of action against Mrs.

Dwyer's estate for the return of the securities she received in 1938 because all his rights and interests in them were vested by the Attorney General in 1948.

Conclusion

The petition for a writ of certiorari should be denied. The Court should also reject petitioner's suggestion that its action be held in abeyance until the determination of a related action in Massachusetts. That action was originally stayed pending decision in this action, and it is important that all proceedings herein be concluded so that the principles of *res judicata* reiterated by the court below can swiftly be applied in the Massachusetts action.

Respectfully submitted,

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